STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs/Appellees/Cross-Appellants,

-vs-

THE MEMORIAL HOSPITAL, a Michigan Non-Profit Corporation d/b/a MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., and JAMES H. DEERING, D.O., P.C., d/b/a SHIAWASSEE RADIOLOGY CONSULTANTS, P.C., Jointly and Severally,

Defendants/Appellants/Cross-Appellees.
_____/

Supreme Court No. 129134

Court of Appeals No. 251110

Lower Court No. 01-007289-NH

129134

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PLAINTIFFS/APPELLEES/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURT'S MAY 5, 2006 ORDER

CERTIFICATE OF SERVICE

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On May 5, 2006, the Court issued an Order granting oral argument on the parties' pending applications for leave to appeal. That order permitted the parties to file supplemental briefs, but it admonished that the parties "should avoid submitting a mere restatement of the arguments made in their application papers." Based on the Court's instruction not to repeat arguments made previously, this brief will be primarily addressed to the points which defendants have made in the responsive briefs which they have filed.

I. THE ISSUES RAISED IN PLAINTIFFS' CROSS-APPLICATION

A. The Court Of Appeals' Error In Attempting To "Harmonize" The Statutes At Issue.

In their cross application, plaintiffs examined at some length the serious error committed by the Court of Appeals in its misguided effort to "harmonize" MCL 600.2102 and the provisions of the Uniform Recognition of Acknowledgements Act. MCL 565.261, *et seq.* (hereinafter: "URAA"). The brief which the defendants filed in response to the plaintiffs' cross application is noteworthy in that it does not (and cannot) take issue with several fundamental principles supporting plaintiffs' argument.[1] These fundamental points include the following:

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[1]The defendants' September 2005 response to plaintiffs' cross-application is also noteworthy in that it completely fails to address two of the three major issues which plaintiffs raised in this Court. In addition to their argument that the Court of Appeals erred in its effort to "harmonize" §2102 and the URAA, plaintiffs argued that, even if there were a conflict between §2102 and the URAA, that conflict should be resolved by giving effect to the latest expression of legislative intent, which is to be found in the Michigan Legislature's 1969 adoption of the URAA. The defendants' response to plaintiffs' cross application is completely silent on this issue. Plaintiffs also argued in Issue IV of their cross application that the Court of Appeals' determination that called for the outright dismissal on limitations grounds of a medical malpractice case filed with a defective affidavit of merit was contrary to this Court's ruling in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). In their response, the defendants have chosen to remain mute on this issue as well.

(continued...)

1. Continuously since 1895 Michigan has had a statute which requires the certification of the authority of an out of state notary, while at the same time the state has had another statute which by its express terms does *not* require such additional certification. *See e.g. Reid v Rylander*, 270 Mich 263; 258 NW 630 (1935); *Sipes v McGhee*, 316 Mich 614; 25 NW2d 638 (1947).

2. The defendants concede that, as adopted by the Michigan Legislature, the URAA "applies to all 'notarial acts'". Defendants' Response to Plaintiff/Cross-Appellants' Application, p. 9. Thus, like the Court of Appeals majority in its June 9, 2005 opinion, the defendants herein do not and cannot contest the fact that, "if the present inquiry were to be decided on the basis of the URAA, the notarization of the

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[1](...continued)

The defendants, while ignoring two of the three issues which plaintiffs actually raised, decided to include a separate section in its responsive brief on the "political pressure" which the Court of Appeals supposedly succumbed to in granting reconsideration in this case. This fatuous philippic deserves no response. Plaintiffs do not come before this Court requesting leave to appeal expecting this Court to be politically mesmerized by the various groups who have filed briefs as *amicus curiae*. Plaintiffs, instead, appear before this Court requesting that it review the Court of Appeals' June 9, 2005 determination because (1) that decision has great significance to the jurisprudence of this state, and (2) that decision is hopelessly wrong. Thus, plaintiffs do not argue that the Court should review the decision in this case simply because that decision is "unjust." What plaintiffs have argued, instead, is that the Court of Appeals' majority decision represents an utterly indefensible abuse of the judicial function in resolving a perceived conflict between the two statutes at issue herein. The defendants' "political" argument in its response to plaintiffs' cross application is, therefore, a waste of paper. There is, however, one theme which defendants develop therein which is worth emphasizing. In that section of their response, the defendants castigate the Court of Appeals' decision on reconsideration on the ground that the duty of a court "is not to make independent policy choices *but to enforce statutes as written.*" Defendants' Application, p. 13 (emphasis added). The defendants' sanctimonious citation to this rather basic principle of representative democracy is truly stunning when one considers that, in the rest of their brief, the defendants argue with an equal degree of sanctimony that this Court should give its blessing to a Court of Appeals' decision which unquestionably rewrote the URAA.

affidavit in question would indisputably be valid." *Apsey v Memorial Hospital (On Reconsideration)*, 266 Mich App 666, 672; 702 NW2d 870 (2005). Thus, *the defendants do not dispute the fact that the URAA, as drafted by the Michigan Legislature, unquestionably applies to all out of state affidavits, including affidavits which are to be filed in a court proceeding.*

3. Having conceded the previous point, the defendants also do not and cannot contest the fact that the Michigan Court of Appeals, in its effort to "fit" §2102 and the URAA together, was compelled to limit the scope of the URAA - to out of state affidavits which are *not* filed in court proceedings - in a manner which is not supported by the text of that act.

The defendants, therefore, do not attempt to justify the decision of the Court of Appeals majority on the basis of the text of the URAA. To the contrary, the defendants concede as they must that, in attempting to "harmonize" §2102 and the URAA, the Court of Appeals majority limited the reach of the URAA in a way which is inconsistent with the text of that statute.

The essence of the defendants' argument is that the Court of Appeals' attempt to harmonize §2102 and the URAA represented, "the only possible method of giving effect to both the URAA and §2102." Defendants' Response, p. 6. According to the defendants' reasoning, the Court of Appeals' decision to limit the URAA to out of state affidavits used for any purpose other than judicial proceedings would not nullify the URAA completely. That uniform act would still have *some* effect under the construction given it by the Court of Appeals' majority. Defendants' Response, pp. 9-10.[2]

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[2]The defendants assert that the limitation on the scope of the URAA imposed by the Court of Appeals majority would still leave that uniform act with "broad applicability."
(continued...)

But, as plaintiffs explained in their cross application, members of the judiciary simply do not have the authority to rewrite statutes to "fit" two competing or conflicting statutes together. Thus, the Court of Appeals in this situation could not take a uniform act, which as written unquestionably applies to *all* out of state affidavits (including those presented in judicial proceedings), and judicially modify that statute to exclude from its coverage any out of state affidavits submitted in conjunction with Michigan court proceedings.

The defendants contend that this Court should uphold the Court of Appeals' judicial modification of the scope of the URAA because, in their view, any other ruling would have the effect of "nullifying" §2102. The defendants maintain that this Court should leave the Court of Appeals' decision undisturbed because, while the judicial rewriting of the URAA undertaken by the Court of Appeals would not completely nullify the URAA (that uniform act would still apply to out of state affidavits *not* used in court proceedings), "a decision that §2102 could allow an 'alternative' method of authenticating affidavits to be read into judicial proceedings . . . would have nullified §2102." Defendants' Response, p. 6.

This argument is completely untenable for two important reasons. First, contrary to the premise of the defendants' argument, holding that the URAA represents "an additional method of

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[2](...continued)
Defendants' Response, p. 9. Plaintiffs would certainly take issue with that statement if that statement were at all relevant to the issues involved in this case. In plaintiffs' view, judicially limiting the scope of the URAA to affidavits which are not submitted in judicial proceedings leaves that uniform act with an extremely limited scope. But, what is of relevance here is not whether the Court of Appeals majority's limitation on the reach of the URAA is to be characterized as "broad" or "narrow". The question, instead, is whether the limitation on the URAA's coverage imposed by the Court of Appeals majority can be supported by the text of the uniform act which the Michigan Legislature passed. It is this fundamental question which the defendants studiously avoid in their response.

proving notarial acts" would not nullify §2102. That statute's provisions for authenticating out of state affidavits would remain in effect and a party could still use the provisions of that statute as the foundation for admitting an out of state affidavit in a Michigan court. For example, MCL 600.2102(4) specifically provides that an affidavit signed in another state may be used in a Michigan court if it is "taken before a commissioner duly appointed and commissioned by the governor of this state." Like the rest of §2102, this provision allowing an out of state affidavit to be taken before a commissioner appointed by the governor of Michigan remains in effect and it represents an alternative method for validating such an affidavit for use in a Michigan court even after the enactment of the URAA. Thus, the URAA most certainly does not "nullify" §2102. The URAA does, however, *by express legislative decree*, constitute an additional method of proving notarial acts taken outside this state.

The preceding sentence highlights the second and far more serious error in the defendants' argument with respect to the possible "nullification" of §2102. In 1969 when the Michigan Legislature enacted the URAA, it specifically indicated therein that the procedures for the authentication of an affidavit under that uniform act would represent "an additional method of proving notarial acts." MCL 565.268. The defendants contend that it would be inappropriate to construe the URAA as providing an additional method for validating out of state affidavits for use in Michigan courts because such a construction would "nullify" §2102. But, what this argument so clearly ignores is that the Michigan Legislature, in enacting the URAA, declared that this uniform act was supposed to operate as an additional means of validating foreign affidavits.

Thus, in stating their position based on the purported "nullification" of §2102, the defendants suggest that plaintiffs are *arguing* that the procedures under the URAA for validating foreign

affidavits are additional to those in §2102. And, the defendants suggest to this Court that it should reject plaintiffs' *arguments* because, if accepted, these *arguments* would "nullify" §2102. Defendants' Response, p. 8. But the notion that the URAA was meant to represent an additional method for validating foreign affidavits is not merely plaintiffs' *argument,* it is the unambiguous expression of the Michigan Legislature as contained in MCL 565.268: "*This act provides an additional method of proving notarial acts.* Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." (emphasis added).

It is not particularly surprising that the defendants' response offers no credible argument to rebut the impact of the language contained in the second sentence of MCL 565.268. The only response which the defendants offer to the important principle imbedded in that sentence is the ultimately unhelpful observation that, "[w]hile . . . MCL 565.268 states that the URAA provides an additional method of verifying 'notarial acts', *§2102 does not allow a 'additional' method of verifying out of state affidavits that must be received or read into evidence.*" Defendants' Response, p. 6 (emphasis in original).

Plaintiffs cannot challenge the legitimacy of this statement; §2102, since it was first enacted in 1879, does not allow for an alternative method of authentication of out of state affidavits. But, this observation does not change the fact that ninety years later the Michigan Legislature enacted the URAA and specifically wrote into that uniform act that the methods for proving an out of state affidavit provided therein would be *in addition to* any other method found in an existing Michigan statute. Thus, the defendants' argument that §2102 does not provide for "additional" methods of proving out of state affidavits overlooks the patently obvious fact that the URAA does.

The defendants, like the Michigan Court of Appeals majority, have failed to come to grips

with the import of the second sentence of MCL 565.268. Ultimately, the *only* response which the defendants can offer is that this sentence in the URAA is to be ignored on the basis of the language contained in §2102(4). But, such a construction is not available to this Court. As the Court has ruled in *State Treasure v Schuster*, 456 Mich 409, 419; 572 NW2d 628 (1998), a court charged with the responsibility of harmonizing two potentially conflicting statutes must not "render[] any relevant provision surplusage or nugatory." That is precisely what the defendants propose here. They, like the Court of Appeals majority, would ask this Court to ignore the second sentence of MCL 535.268 and conclude that only §2102 is to apply to affidavits signed out of state and used in a Michigan court proceeding.

Plaintiffs have fully explained in their cross application how the language contained in MCL 565.268 eliminates any conceivable conflict between the provisions contained in the URAA and §2102. Both of these statutes remain in effect and compliance with *either* provides the basis for the recognition in Michigan of an affidavit signed outside this state. The defendants do not in any way dispute that that is what the text of MCL 565.268 provides. The best that the defendants can do is to suggest that giving effect to the clear language contained in the second sentence of MCL 565.268 would "nullify" §2102. But, by its express language, MCL 565.268 does not "nullify" §2102. That earlier statute remains in effect and, along with the URAA, it provides an additional basis for the validation of a foreign affidavit.

In their cross application plaintiffs also pointed out that the result reached by the Court of Appeals majority was in direct conflict with another provision of the URAA, MCL 565.269. That statute specifies that the provisions of the URAA "shall be so interpreted as to make uniform the laws of those states which enact it." In their response, the defendants do not even address this

provision in the uniform act.

As of the time this supplemental brief is being prepared, nearly one year has elapsed since the Court of Appeals' ruling in this case requiring compliance with §2102. In that one year period Michigan lawyers have had to do something which lawyers in no other state are compelled to do. Michigan lawyers seeking to use an out of state affidavit in a Michigan court proceeding must not only obtain a sworn statement signed by a notary public, they must also obtain a certification of the notary's signature. Thus, despite an explicit legislative mandate in MCL 565.269 that the law in this state with respect to out of state notarial acts was to become uniform in those states adopting the URAA, Michigan law at present stands completely isolated, firmly rooted in the 19th century notions embodied in §2102.

Another thing which attorneys have observed over the one year period in which the Court of Appeals majority decision has controlled is that, under a literal application of §2102, there are a significant number of states in which full compliance with that statutory provision is impossible. MCL 600.2102 requires that the signature of the notary who witnessed an out of state affidavit be certified, "by the clerk of any court of record in the county which such affidavit shall be taken." MCL 600.2102(4). However, in a significant number of states, the certification required by §2102 cannot be performed by a clerk of the court. Instead, the certification function compelled by §2102 is assigned to an official other than the clerk of the court, such as the state's Secretary of State.[3]

In their cross application, plaintiffs also cited to both the National Conference of

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[3]At the same time this supplemental brief is being filed, the State Bar of Michigan Negligence Section has moved for permission to file a supplemental brief. That brief catalogues the twenty-four states in which the Clerk of the Court will not or cannot certify a notary's signature.

Commissioners on Uniform State Laws' Prefatory Note to the URAA as well as the Michigan Law Revision Commission's 1969 Report to the Michigan Legislature with respect to the URAA. Both the Prefatory Note and the Law Revision Commission's Report are of importance here because each communicated to the Michigan Legislature that, if it decided to adopt the URAA as promulgated by the Commissioners, it would *not* be necessary to remove from the statute books existing laws on the subject of foreign affidavits even if those existing laws conflicted with the provisions of the URAA. The reason why no such action had to be taken was because of the language which is now contained in MCL 565.268.

The defendants have argued in their response to plaintiffs' cross application that the Court should disregard the Commissioner's Prefatory Note and the Law Revision Commission's Report for two reasons. The defendants first suggest that the Court should ignore the contents of these two sources because neither "addresses the interplay between §2102 and the URAA . . ." Defendants' Response, p. 10. This is nonsense.

The Commissioner's Prefatory Note and the Law Revision Commission's Report bear directly on the relationship between the uniform act passed by the Michigan Legislature in 1969 and §2102. Both of these sources explain precisely why it is that Michigan presently has one old statute which requires an additional certification of a notary's signature for an affidavit signed outside this state and another statute which expressly declares that such additional certification is *not* required. MCL 565.263(1). The reason why these two statutes co-exist within the Michigan Complied Laws is because of the language contained in MCL 565.268 - the URAA was designed to set out a "method of proving notarial acts," which was *additional* to any preexisting law on the subject. Thus, the Michigan Legislature was put on notice at the time it was contemplating the adoption of the

URAA that it would not be necessary to remove any existing laws which might be inconsistent with the authentication procedures set out in the URAA.

The defendants further argue that the Court should disregard the substance of the Commissioners' Prefatory Note and the Law Revision Commission's Report because, in their view, this type of "legislative history" may can only be employed where the statues in question are ambiguous. According to the defendants, since neither §2102 nor the URAA are ambiguous, these extrinsic sources should not be considered.

Plaintiffs would concur completely with the defendants' concession that the URAA is unambiguous. This concession is clearly broad enough to encompass the defendants' acknowledgment that the second sentence of MCL 565.268 is unambiguous. Since that portion of the URAA is unambiguous, it is perhaps unnecessary for the Court to consider what either the Commissioners on Uniform State Laws or the Law Revision Commission had to say with respect to the uniform act which the Michigan Legislature was considering in 1969.

However, plaintiffs would suggest that the case law which the defendants cite in support of their argument against the use of the Prefatory Note and Law Revision Commission's Report is misplaced here. The defendants rely on several cases which have addressed the limited weight to be accorded legislative analyses prepared by the Michigan Legislature's staff. *See Frank W. Lynch & Company v Flex Technologies, Inc.*, 463 Mich 578, 587; 624 NW2d 180 (2001); *In Re Certified Question*, 468 Mich 109, 115, n. 5; 659 NW2d 597 (2003). These cases are not so easily transferrable to the instant case.

One of the reasons for this lies in the actual text of the URAA, which declares that the purpose behind that uniform act was to achieve consistency in how the law with respect to foreign

notarial acts is to be interpreted in those states adopting the URAA. *See* MCL 565.269. Thus, when the Michigan Legislature adopted the URAA without any changes in the Commissioner's proposed uniform act, it legislatively demanded consistency in the interpretation of that statute in the states adopting the URAA. Under these circumstances, the comments of the Uniform Law Commissioners take on a weight which is far more significant than a staff prepared legislative analysis. *See generally* 2A Sutherland Statutory Construction (6th ed), §48.11; *cf People v Alford*, 405 Mich 570, 586, n. 6; 275 NW2d 484 (1979); *Dart National Bank v Mid-States Corporation*, 356 Mich 574, 583-584; 97 NW2d 98 (1959); *Miller v State Farm Insurance Company*, 410 Mich 538, 557-560; 302 NW2d 537 (1981); *see also Michigan National Bank v Cote*, 451 Mich 180, 184, n. 4; 546 NW2d 247 (1996).

B. <u>The Resolution Of A "Conflict" Between §2102 And The URAA</u>

Based on the unambiguous language contained in MCL 565.268, there is no conflict between §2102 and the URAA. In their cross application, however, plaintiffs raised the additional question of how, if a conflict existed, that conflict would have to be resolved. *See* Plaintiffs' Cross Application, pp. 31-34.

Nothing which the defendants have offered in response to plaintiffs' cross application can alter the fact that there is no direct conflict between these two statutes. It is, however, interesting to note that the entire premise of the defendants' argument in response to the cross application is that such a conflict exists. The defendants do not dispute the fact that the URAA applies to *all* out of state affidavits, whether submitted in conjunction with a judicial proceeding or not. What the defendants contend is that, giving effect to the URAA's provisions puts that statute directly at odds with the language contained in §2102(4), which specifies that out of state affidavits shall be

accompanied by an additional certification.[4]

Thus, in making the arguments that they do, the defendants implicitly rely on the existence of a conflict between §2102 and the URAA. The defendants then propose a simplistic resolution of that conflict - full adoption of the requirements contained in §2102 for all affidavits signed out of state and used in a Michigan court. The defendants have, however, skipped an important step in determining which of these two "conflicting" statutes will be given effect.

As plaintiffs pointed out in their cross application, this Court has in numerous cases resolved irreconcilable conflicts between two statutes based on the "doctrine of last enactment." Under that doctrine, where two statutes conflict, the latter passed statute, "must control as the more recent expression of legislative intention." *Centerline v 37th District Judge*, 403 Mich 595, 607; 271 NW2d 526 (1978).

There is, for reasons discussed in the first section of this brief, no inherent conflict between §2102 and the URAA, the latter statute simply represents an additional means of validating a foreign affidavit. But, if such a conflict did exist as the defendants contend herein, the defendants could still not prevail in this case because the comprehensive uniform act passed by the Michigan Legislature in 1969, "must control as the most recent expression of legislative intent."

II. THE ISSUES RAISED IN DEFENDANTS' APPLICATION.

In their Application for Leave to Appeal, the defendants were operating under a fundamental

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[4]As discussed earlier, the defendants propose to resolve that conflict through a judicial rewriting of the URAA. The defendants (and the Court of Appeals majority) propose to rewrite the URAA so as to carve out of that act's broad coverage an exception for foreign affidavits which are used in Michigan court proceedings. There is, of course, no such limitation in the URAA and the judicial rewriting of that act which the defendants advocate cannot eliminate a conflict between the uniform act and §2102, assuming that such a conflict exists.

misapprehension of what the Court of Appeals actually did in this case. The defendants argued in their Application that this Court should review and reverse the Court of Appeals' decision on reconsideration case because it represented a "purely prospective advisory opinion" which, according to the defendants, that Court did not have the constitutional authority to issue. Defendants' Application, pp. 10-19. Based on observations contained in this Court's decision in *Wayne County v Hancock*, 471 Mich 445, 484, n. 98; 684 NW2d 705 (2004), the defendants argued that the Court of Appeals had exceeded its authority by issuing a purely prospective advisory opinion, "refus[ing] to apply it to the parties before the Court, or to any case currently pending in this state." Defendants' Application, p. 7.

Plaintiffs filed a response to the defendants' application in which they pointed out the rather glaring error with respect to the central issue which the defendants ask this Court to review - the Court of Appeals majority's most certainly did *not* apply its ruling regarding §2102 prospectively only. In point of fact, the Court of Appeals majority made its decision with respect to §2102 applicable to *every single case* which was pending at the time that decision was announced, *including this case*. As a result of the Court of Appeals majority decision herein, *every single case* which was pending at the time its decision was announced had to come into compliance with the certification requirement contained in §2102. *Apsey*, 266 Mich App at 682. ("With regard to all medical malpractice cases pending in which plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification.")

The defendants' application for leave, therefore, requested that this Court review the question of whether the rule announced by the majority in this case with respect to §2102 should be given

retrospective effect. Thus, the defendants chose to apply for leave to appeal on an issue on which they had *prevailed* in the Court of Appeals. This Court generally limits the questions which it will review to those raised in a party's application for leave. MCR 7.302(G)(4). If the Court were to apply that general principle to this case, there is nothing in the defendants' application for this Court to review.[5]

It is not particularly surprising that, after plaintiffs filed their response to the defendants' application, the defendants filed a Reply Brief in which they changed course. In that Reply Brief, the defendants for the first time addressed that aspect of the Court of Appeals' decision which adversely affected them, the majority's determination that it would not strictly enforce the statute of limitations under the circumstances of this case. In that opinion, the two person majority ruled:

> In the present case, equity also supports a deviation from the strict compliance with the statute of limitations because of understandable confusion regarding the applicable statute. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004).
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> * * *
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> Similarly, plaintiffs in the present case, apparently like a significant number of the bar of Michigan, were under the impression that meeting the requirements of the

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[5]In addition to its "purely prospective" argument, the defendants also raised in their application a bizarre jurisdictional issue. The defendants contended that because the affidavit of merit originally accompanying plaintiffs' complaint was defective, this case was, in the defendants' view, never commenced. From the premise that this case was never commenced, the defendants proceed to the conclusion that the Court of Appeals had to dismiss this case because the circuit court never had jurisdiction over it. There are a significant number of errors imbedded in this bit of illogic. Suffice it to say that, even if the defendants were absolutely right and the failure to file an affidavit of merit which did not have the §2102 additional certification could have prompted the circuit court to conclude that this case was never "commenced," *plaintiffs would have had the right to challenge that determination on appeal*, both by attacking the premise of that finding, *i.e.*, that the affidavit did not have to comply with §2102 to "commence" the case, or by attacking the circuit court's conclusion that it did not have jurisdiction on that basis.

> URAA was sufficient to verify an out-of-state notarial act on an affidavit of merit filed with the court to support a medical malpractice claim. . . The equities in this case dictate that we find plaintiffs' claims are not time barred. But for the certification, plaintiffs' complaint would not have been dismissed.
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> 266 Mich App at 681.

The defendants argued in their Reply Brief that the majority's reliance on *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411; 684 NW2d 864 (2004), was misplaced. In *Bryant*, this Court held on equitable grounds that it would not enforce a statute of limitations defense in a medical malpractice action because the plaintiffs' failure to comply with the prescribed limitations period was "the product of understandable confusion about the legal nature of her claim." 471 Mich at 432.

This Court has more recently affirmed *Bryant*'s use of equity in *Devillers v Auto Club Ins Co*, 473 Mich 562, 590-591, n. 65; 702 NW2d 539 (2005). In *Devillers*, this Court recognized that a court has equitable powers to affect a limitations defense, but that these powers are to be exercised only in "unusual circumstances." 473 Mich at 590. The *Devillers* Court identified *Bryant* as one such case of "unusual circumstances," because of the "preexisting jumble of convoluted case law through which the plaintiff was forced to navigate." *Id.*, n. 65.

In this case, the "understandable confusion" with respect to the applicable law derived from statutes, not case law. Until the Court of Appeals majority chose to judicially limit the scope of the URAA, there was a uniform act passed by the Michigan Legislature in 1969 which unequivically indicated that, where an out of state affidavit was signed by a notary public, "[f]urther proof of his authority is not required." MCL 565.263(1). Thus, a 1969 uniform act advised plaintiff's counsel that further certification of an out of state notary's authority was not necessary in Michigan.

This case, therefore, presents a somewhat ironic twist on the limitation on a court's equitable

authority discussed by this Court in *Devillers*. There, the Court indicated that a court's use of its equitable powers to preclude a statute of limitations defense cannot result in "a categorical redrafting of a statute in the name of equity." 473 Mich at 590, n. 650. Here, the use of the court's equitable power was employed *precisely* ***because*** *a court insisted on redrafting a statute*, limiting the scope of the URAA in a manner which was unquestionably not contemplated by the Michigan Legislature when it adopted that statute.

III. THE CONSTITUTIONAL ARGUMENTS RAISED BY *AMICI CURIAE.*

Various *amici curiae* have joined in this case. These *amici* have, among other things, rasied constitutional concerns regarding the application of 2102's certification requirement. Plaintiffs will not restate these constitutional arguments. Plaintiffs would, however, adopt these arguments and it would urge the Court to avoid a result which would implicate these constitutional concerns.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Sue H. Apsey and Robert Apsey, Jr., respectfully request that this Court grant their cross-application for leave to appeal and give full consideration to the important legal issues presented herein. Alternatively, plaintiffs-appellants request that the Court summarily reverse the Court of Appeals' decision in this case and remand this case to the Shiawassee Circuit Court for further proceedings.

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